



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP -7 2011

Barbara A. Jenkins, Treasurer
Josh Penry, Campaign Manager
Jane Norton for Colorado Inc.
P.O. Box 3008
Englewood, Colorado 80155

RE: MUR 6366
Jane Norton for Colorado Inc. and
Barbara A. Jenkins, in her official
capacity as treasurer
Josh Penry

Dear Ms. Jenkins and Mr. Penry:

On September 8, 2010, the Federal Election Commission notified Jane Norton for Colorado Inc. and Barbara A. Jenkins, as treasurer ("the Committee"), and Josh Penry of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On August 30, 2011, the Commission ~~finned~~, on the basis of the information in the complaint, and information provided by the Committee, that there is no reason to believe Jane Norton ~~for Colorado Inc.~~ and Barbara A. Jenkins, in her official capacity as treasurer, and Josh Penry violated 2 U.S.C. § 441b. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's ~~finding~~, is enclosed for your information.

If you have any questions, please contact Kasey Morgenheim, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 **RESPONDENTS:** Jane Norton for Colorado Inc. and **MUR 6366**
6 Barbara A. Jenkins, in her official
7 capacity as treasurer
8 Josh Penry
9

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11 **I. GENERATION OF MATTER**

12 This matter was generated by a complaint filed with the Federal Election Commission by

13
14 Ryan Miskell. See 2 U.S.C. § 437g(a)(1).

15 **II. FACTUAL SUMMARY**

16 This matter concerns allegations that the U.S. Chamber of Commerce ("the Chamber")
17 made a prohibited corporate in-kind contribution to Jane Norton for Colorado Inc. ("Norton
18 Committee" or "Committee"), Jane Norton's principal campaign committee for U.S. Senate in
19 Colorado in 2010. Complainant alleges that the Chamber coordinated its expenditures for a
20 television advertisement supporting Jane Norton with the Norton Committee via communications
21 between the Chamber's Vice President, Bill Miller, and various Norton Committee
22 representatives. Complainant also alleges that the Chamber and the Committee coordinated
23 fundraising for the electioneering communication through Charles and Judy Black.

24 **A. Background**

25 Jane Norton was a candidate in the Republican primary election for Senate from
26 Colorado in 2010 and Jane Norton for Colorado Inc. was her principal campaign committee.
27 Barbara Jenkins is the Committee's treasurer. Josh Penry was the campaign manager for Norton
28 and the Committee.

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On August 2, 2010, the Chamber sponsored a television advertisement entitled "Stand up to Washington," which supported Jane Norton's candidacy in the Colorado Republican Senate primary election.¹ Available at http://www.politico.com/blogs/bensmith/0810/Chamber_up_backing_Norton_in_CO.html. On July 29, 2010, the Chamber filed a Form 9 (24-Hour Notice of Disbursements/Obligations for Electioneering Communications) with the Commission, which disclosed that the Chamber spent \$250,000 on the advertisement and listed Bill Miller, the Chamber's Senior Vice President for Political Affairs and Federation Relations, as a person "sharing/exercising control" over the electioneering communication.

B. Alleged Coordination

1. Complaint

The complaint alleges that the Chamber coordinated the "Stand up to Washington" advertisement with the Norton Committee, resulting in the Norton Committee accepting a prohibited corporate contribution. Complaint at 1. The complaint contends that the Chamber endorsed Ms. Norton on June 28, 2010 and that Bill Miller made the endorsement. On that same date, Bill Miller, Jane Norton, and Norton Committee campaign manager, Josh Perry, participated in a conference call to announce the endorsement. *Id.* The complaint alleges that the Chamber launched the "Stand up to Washington" advertisement after meeting with Ms. Norton and her staff and after formally endorsing her, resulting in *per se* coordination. *Id.* at 2. The complaint attaches several articles about the Chamber's endorsement of Jane Norton to support this assertion.

¹ The complaint identifies the name of the advertisement as "Rock Ribbed Conservative," however the title was changed to "Stand up to Washington."

1 The complaint also contends that Bill Miller, who was listed as a person exercising
2 control over the advertisement on the Form 9, communicated his support and endorsement of
3 Jane Norton through Twitter and in person and had met with Ms. Norton and Committee
4 representatives to discuss their campaign strategy for use in the Chamber's issue advocacy
5 campaign. *Id.* at 2-3. Finally, the complaint asserts that "public information and knowledgeable
6 sources" indicate that Josh Penry and Bill Miller coordinated with Charles and Judy Black to
7 raise money for the advertisement, and that Judy Black is a representative of the Norton
8 Committee who is employed by a lobbying firm that works for the Chamber. *Id.* at 2.

9 **2. The Norton Committee's Response**

10 The response from the Norton Committee and its treasurer, Barbara Jenkins, asserts that
11 Ms. Jenkins does not know Bill Miller and has never spoken or communicated with him in any
12 manner. Norton Committee Response at 1. Ms. Jenkins contends that she was not aware of the
13 planning or purchase of a television ad for the Committee paid for by the Chamber. *Id.* Josh
14 Penry did not separately respond to the complaint.

15 **III. ANALYSIS**

16 The Commission finds no reason to believe that Jane Norton for Colorado Inc. and
17 Barbara A. Jenkins, in her official capacity as treasurer, and Josh Penry violated 2 U.S.C. § 441b
18 by receiving a prohibited in-kind contribution in the form of a coordinated communication.

19 Under the Federal Election Campaign Act of 1971, as amended ("the Act"), a corporation
20 is prohibited from making any contribution in connection with a Federal election, and candidates
21 and political committees are prohibited from knowingly accepting corporate contributions.

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1 2 U.S.C. § 441b. An expenditure made by any person "in cooperation, consultation, or concert,
2 with, or at the request or suggestion of, a candidate, his authorized political committees or their
3 agents" constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i).

4 A communication is coordinated with a candidate, a candidate's authorized committee, or
5 agent of the candidate or committee when the communication satisfies the three-pronged test set
6 forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than that
7 candidate or authorized committee; (2) the communication satisfies at least one of the content
8 standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of
9 the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission's regulations at
10 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind contributions
11 from the party paying for such communications to the candidate, the candidate's authorized
12 committee, or the political party committee which coordinates the communication.

13 While it appears that the Chamber's "Stand up to Washington" advertisement satisfies the
14 payment and content prongs of the coordinated communications analysis, there is no available
15 information indicating that the conduct prong is satisfied.

16 **A. Payment**

17 The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied.
18 The Chamber filed a Form 9 with the Commission on July 29, 2010, disclosing that it spent
19 \$250,000 on the "Stand up to Washington" advertisement.

20 **B. Content**

21 The content prong of the coordination regulation is also satisfied. The content prong is
22 satisfied if the communication at issue meets at least one of the following content standards:

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1 (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a
2 public communication that disseminates, distributes, or republishes, in whole or in part,
3 campaign materials prepared by a candidate or the candidate's authorized committee; (3) a
4 public communication that expressly advocates the election or defeat of a clearly identified
5 candidate for Federal office; or (4) a public communication, in relevant part, that refers to a
6 clearly identified House or Senate candidate, and is publicly distributed or disseminated in the
7 clearly identified candidate's jurisdiction 90 days or fewer before the candidate's primary
8 election.² See 11 C.F.R. § 109.21(c).

9 The Chamber's advertisement identified Senate candidate Jane Norton and was broadcast
10 on television on August 2, 2010, eight days before the August 10, 2010 Republican primary
11 election in Colorado. Thus, the communication at issue in the complaint satisfies the content
12 prong by constituting a public communication referring to a clearly identified candidate
13 distributed within 90 days of an election.

14 C. Conduct

15 The Commission's regulations set forth the following six types of conduct between the
16 payor and the committee, whether or not there is agreement or formal collaboration, that satisfy
17 the conduct prong of the coordination standard: (1) the communication "is created, produced, or
18 distributed at the request or suggestion of a candidate or an authorized committee," or if the
19 communication is created, produced, or distributed at the suggestion of the payor and the
20 candidate or authorized committee assents to the suggestion; (2) the candidate, his or her
21 committee, or their agent is materially involved in the content, intended audience, means or

² A "public communication" is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

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1 mode of communication, the specific media outlet used, or the timing or frequency of the
2 communication; (3) the communication is created, produced, or distributed after at least one
3 substantial discussion about the communication between the person paying for the
4 communication, or that person's employees or agents, and the candidate or his or her authorized
5 committee, his or her opponent or opponent's authorized committee, a political party committee,
6 or any of their agents;³ (4) a common vendor uses or conveys information material to the
7 creation, production, or distribution of the communication; (5) a former employee or independent
8 contractor uses or conveys information material to the creation, production, or distribution of the
9 communication; and (6) the dissemination, distribution, or republication of campaign materials.
10 11 C.F.R. § 109.21(d)(1)-(6).

11 The complaint alleges that the Chamber aired the "Stand up to Washington"
12 advertisement after endorsing Jane Norton and after representatives of the Chamber, including
13 Bill Miller, met with representatives of the Norton Committee, including Jane Norton, Judy
14 Black, and Josh Penry. The complaint also suggests that the Chamber and the Norton
15 Committee communicated about the Committee's campaign strategy. Complaint at 2-3.

16 The respondents have specifically denied facts that would give rise to a conclusion that
17 the conduct prong is satisfied pursuant to 11 C.F.R. § 109.21(d). Namely, the respondents have
18 specifically rebutted any implication that the advertisement was created at the request or
19 suggestion of, with the material involvement of, or after substantial discussions with, the
20 candidate or her agents, thereby negating the existence of conduct at 11 C.F.R. § 109.21(d)(1)-
21 (3). See Norton Committee Response at 1. In addition, the available information indicates that

³ A "substantial discussion" includes informing the payor about the campaign's plans, projects, activities, or needs, or providing the payor with information material to the communication. See 11 C.F.R. § 109.21(d)(3).

1 the Chamber has a firewall policy that existed at the time of the communication and appears to
2 satisfy the safe harbor criteria at 11 C.F.R. § 109.21(h); *i.e.*, the policy appears to have been
3 designed to prohibit the flow of information between its employees and consultants and those of
4 federal candidates, and it was distributed to relevant employees and consultants.

5 The available information also indicates that the Chamber and the Norton Committee did
6 not share a common vendor and that no former Norton Committee employee worked with the
7 Chamber on its advertisement. See 11 C.F.R. § 109.21(d)(4)-(5). While the complaint alleges
8 that Judy Black, a representative of the Norton campaign, was employed by a lobbying firm that
9 worked for the Chamber, the available information clarifies that her employer was retained by
10 the ILR, a separate entity, and thus was not a vendor to the Chamber. The available information
11 also indicates that her employer had no involvement with the "Stand up to Washington"
12 advertisement, that Charles and Judy Black did not raise any funds for the Chamber's
13 advertisement, and that they were not involved in its production or dissemination.

14 Given the speculative nature of the complaint, the respondents' specific denials, and the
15 absence of any other information suggesting coordination, it appears that the conduct prong of
16 the coordinated communications regulations has not been met. Accordingly, the Commission
17 finds no reason to believe that Jane Norton for Colorado Inc. and Barbara A. Jenkins, in her
18 official capacity as treasurer, and Josh Penry violated 2 U.S.C. § 441b by receiving a prohibited
19 in-kind contribution in the form of a coordinated communication.

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